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November 18, 2012

Steven G. Johnson, Esq., Chair
Supreme Court Advisory Committee on the Rules of Professional Conduct
5336 W. Earl Place
Highland, UT 84003

Re: Proposals for Rule Changes or Study, Rules of Professional Conduct, and Rules Governing the Utah State Bar

Dear Mr. Johnson and Committee Members:

I am submitting with this letter a number of suggestions for changes, or further study, to Rules of Professional Conduct, and related Rules Governing the Utah State Bar, that I have come to believe are either necessary, or at least worthy of consideration and discussion or study.

My interest in the topic was not planned. After I retired fifteen months ago from the Third District Court, I imagined that my new career would be primarily mediation and arbitration. I have, in fact, been employed fulltime in both areas since the day I retired, but I have also been asked to represent a number of lawyers in discipline proceedings. To date I have made formal appearances in four State OPC matters and one federal district court disciplinary proceeding. I have also been retained to counsel three additional lawyers during their State proceedings, and I have counseled several lawyers regarding judicial conduct complaints—not the same forum, of course, but a close relative to lawyer discipline.

The extent of my involvement has varied, but at the State level I have appeared at two Screening Panels and one Exception hearing. I have negotiated a diversion in the remaining State matter. I also, of course, handled formal discipline proceedings as a district judge, and I was subpoenaed as a witness in a Panel hearing while still a judge. These experiences have more than piqued my interest. They have given me some concern about certain procedures, inconsistent or ambiguous rules, and a well-intended, but in my experience and opinion flawed, informal process that creates due process concerns with which all lawyers and judges must be concerned.

Be assured that I understand that while my experience with the system is substantially greater than most lawyers, it does not compare to the experience of the OPC lawyers, and the dedicated cadre of lawyers and public members who have worked to create and operate the present discipline structure for years. For this reason I hesitate to proffer suggestions and urge

changes, but I have concluded that the best course is to jump in, and test my thoughts with the experts.

As a matter of form, I have decided that the simplest thing is to provide four discrete submissions, which the Committee may shuffle, prioritize, consider, or shred, as they think best. I have included a couple of possibly controversial proposals that are fundamentally policy issues. They deal with the judicial proceedings privilege, and the issue of just what is due the parties in informal proceedings. I do this with full understanding of the Supreme Court's constitutional responsibility in all matters concerning the Bar generally, and discipline in particular. As a former trial judge, I confess that one of my favorite judicial pronouncements is: ". . . knowing that we neither needed nor desired the participation of the district court . . ." In the Matter of the Discipline of Ray M. Harding, Jr., 2004 UT 100, ¶19.

One reads this language with a slightly wry smile when on the bench, but I understand the core truth. The Court absolutely controls the discipline process and outcome. As I set forth in attachment 1, that is both a concern and a protection in the area of due process. It is a concern, because informal proceedings are quick, rather loose in what is received, very limited in pre-hearing options to discover evidence, and although in my three experiences the Panel was intelligent and committed to fairness, the power to impose a public reprimand is a potential career-wrecker. The Supreme Court's conscientious effort to retain final control over all aspects of lawyer discipline is a protection, which they have exercised frequently, to correct an inequitable result, but it comes late, at great emotional and financial cost. I only argue that, to the extent we can make the process fairer, much unneeded pain, some injustice, and widespread lawyer bitterness against the Bar, can be avoided. The Supreme Court's role and authority cannot and will not be impacted by such an effort.

I have copied this letter, with attachments, to Mssrs. Walker and Wahlquist at the OPC, and Bar President Lori Nelson. They are all aware of my interest, and I feel it appropriate to keep them in the loop. Of course, I also copy Ms. Abegglen, Appellate Court Administrator and staff to the Committee. When I made my first contact, I offered to make myself available to the Committee or any member, individually or as a group, if that might be helpful. I remain willing to respond in any forum. To avoid any misunderstanding about my motives, representing lawyers is an insignificant source of my income. In fact, it is a distraction, but one I am committed to.

Sincerely,

Robert K. Hilder

Cc. w/attachments: Billy Walker, Esq. and Todd Wahlquist, Esq., Office of Professional Counsel; President Lori Nelson, Esq.; and Diane Abegglen.

Attachment 1

# WHAT PROCESS IS DUE IN THE INFORMAL DISCIPLINE PROCESS?

**Submitted by Robert K. Hilder**

**November 18, 2012**

1. **Is a public reprimand a "low level" sanction not entitled to substantial due process protection?**

It is a challenge to tackle due process in the context of informal discipline. The Utah Supreme Court has spoken on the subject with clarity and fairly frequently. For example, in Long v. Committee, the court explained its view on due process:

> It is undisputed that an attorney is entitled to due process in disciplinary actions. The right to due process requires that an individual receive adequate notice of the charges, "and an opportunity to be heard in a meaningful way." But the level of due process required depends on the context of the proceeding. For example, we have explained that "due process is flexible and calls for the procedural protections that the given situation demands." In the context of informal attorney discipline, we have stated that the procedures listed in the RLDD are sufficient to afford due process.

Long v. Committee, 256 P.3d 206, 2011 UT 32, ¶29.

In the same case, the court explained why the flexible due process tended to comparatively limited guarantees in an informal discipline casas opposed to a court proceeding:

> Furthermore, in rejecting Mr. Long's argument that particularized findings of fact are necessary, we note that the nature of a screening panel's role in attorney discipline matters makes such a requirement impractical or infeasible. Screening panels are made up of volunteer attorneys and have only limited powers. For example, screening panels can dismiss cases, issue letters of caution, refer cases to the Committee Chair for recommendations of low-level discipline, or direct the OPC to file a formal case against the respondent for further proceedings in the district court.[26] This system was specifically designed to promote speed and efficiency in low-level attorney discipline cases. Accordingly, a requirement that a screening panel state detailed factual findings would be unnecessarily burdensome in light of the limited function of a screening panel's role in the proceedings.

Id. at ¶36 (emphasis added).

I do not, of course, challenge the court's rationale that flexible due process standards are appropriate. I do question the underlying premise; namely, that all informal discipline cases are, in fact, "low level." The court routinely characterizes disbarment as a "professional death penalty." I have no reason to argue with that characterization, and I would agree that private admonitions, and all sanctions below that level, are truly relatively low level. That is simply not true of public reprimands.

The professional and personal damage wrought by a public reprimand inflicts very substantial wounds, even if they are not always fatal—and sometimes they may, indeed, end a career. If the process due is in fact properly tied to the severity of the discipline, I submit that the line has been drawn one step too high.

The remedy is not solely to move cases that the Panel determines may warrant public reprimand into the formal track. I submit that to make the move to a formal process is a better choice than continuing the present system, but requiring more by way of procedures, and elevating the OPC prosecutorial role to a more legitimate prosecution model, with the appropriate discretion, could also ameliorate the present problems substantially.

2. **The Supreme Court's ultimate authority to substitute its judgment for that of the Screening Panel and Ethics and Discipline Committee is not a sufficient safeguard.**

The Supreme Court's authority, derived from article VIII, section 4 of the Utah Constitution is plenary. It provides that "[t]he Supreme Court by rule shall govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to practice law." The court explained in Long its view that its authority is the ultimate check on error at the Committee level:

> Because we are charged with the power to discipline attorneys, conclusory findings of fact do not present the same difficulty in the attorney discipline context as they do in the administrative context. Thus, because we are charged with attorney disciplinary matters, we can make a determination as to whether a Committee's recommendation is appropriate. Based on this different role, we reject Mr. Long's argument that our precedent requires screening panels to make the same detailed findings of fact that are necessary when we review administrative agency determinations.

Long v. Committee, 256 P.3d 206, 2011 UT 32, ¶41 (emphasis added).

The underlined text gives rise to my query: Can the Supreme Court's determination of appropriateness be any better than the quality of the initial proceeding? As it stands today, the Panel process is as good as it can be in light of the constraints on both the Panel and the OPC. I do not pretend to understand all that occurs at the OPC or in the Panel by a long way, but I have learned a few things. For example;

- Although the Supreme Court refers to written findings, conclusions, and recommendations as the Panel's, in the typical case the only thing Panel writes is a summary decision sheet, which is the basis of the final document written by OPC lawyers. The Panel chair is certainly free to edit or modify what the OPC provides, but for the very reasons the court states as justification for relaxed due process, that rarely occurs. The OPC is almost powerless to improve the written product, because OPC counsel may not have communication with the Panel to clarify intent, unless the respondent or his or her lawyer is present—and there is apparently no procedure to permit such a meeting or conference.

- The court suggests that respondents are aware "of the facts forming the basis for each alleged violation of the rules of professional conduct because he received a copy of the

informal complaints and the OPC's findings for each matter." Long at ¶30. That appears to be a belief not confirmed by my experience. For example:

- The OPC, hewing to its apparent view that its job is to provide, but not filter, information, throws pretty much any alleged "fact" into the hopper, and a fact is anything provided through investigation, whether relevant, prejudicial or incredible.

- The OPC may, or may not state the basis for inclusion of a potential rule violation. In my most recent matter, the OPC added one additional rule, barely two weeks before the Panel hearing. The rule was cited. Certainly facts were cited in the original NOIC, but there were no "OPC findings" or any attempt to tie the "facts" in the NOIC to the new rule. When challenged at the hearing, OPC counsel explained—I believe in good faith—that because the Panel may find a violation on any rule, whether referenced in the NOIC or not, it was OPC's responsibility to add any rules that might fit, with or without explanation, at any time.

- Lawyer respondents do not always know specifically what they are facing. The reality of Panel hearings is that, as I saw recently when I accepted a matter after the Panel made its recommendations, that the NOIC and the Panel recommendations were similar only because they both referenced Rules of Professional Conduct. In that matter, the NOIC referenced five Rules as potential conduct issues. The Panel rejected four rules—all but Rule 8.4(a), the ever-present last count, which the rules committee is now re-considering at the direction of the Supreme Court. The Panel found violations of two rules that had never been referenced at any prior time. Presumably that is within the Panel's power, but it is not consistent with the court's statement that due process is satisfied because the respondent knew what he was facing.

- Finally, on this point, and in general terms, the inability to cross-examine and otherwise test evidence against the respondent in a form familiar to lawyers may be enough for private discipline, but it falls short of fair process at some point as the sanctions increase. I suggest the potential of public reprimand is that point.

### 3. The OPC should either function as a prosecutor, or as staff to the Committee, but it—or at least the same lawyer--cannot do both and ensure fairness

The OPC ostensibly has a "prosecutorial" function, Rule 14-504(b) and (b)(6), and it does in fact screen cases, and dismiss some as frivolous. Beyond these functions, the OPC does not appear to function in any other substantial way as a prosecutor, unless the matter is filed as a formal complaint in district court.

A prosecutor performs an invaluable quasi-judicial function. It is my understanding that OPC lawyers see their role as inherently neutral at the Panel stage (see above); that is, except for an early screening, they exercise no discretion in what they present to the Panel. They make no

judgments regarding the relevance or credibility of evidence. In fact, in my experience they take the neutrality stance so seriously that they will not agree to stipulate to uncontested facts before the Panel, despite the economies that can be achieved and the Rules of Civility and Professionalism that encourage stipulations. That may be what is intended. If so, the role should be reconsidered, and renamed. If, however, prosecution is intended, that fact should be clarified, and the obligations and professional responsibilities of the OPC defined.

Until the OPC role is clarified, they are in a vulnerable and invidious position. On the one hand, acting as secretary to the Committee, Rule 14-503(h), they are more akin to counsel to the OPC than prosecutor, but the court has made it clear that OPC lawyers have no presumptive good faith defense if they do the Committee's bidding, but at the same time violate any rule governing the conduct of lawyers, including Rule 11, Utah Rules of Civil Procedure:

> We also reject the OPC's suggestion that by filing a complaint based on a screening panel's findings and recommendations, it necessarily acts in good faith. Admittedly, RLDD 11(a) requires the OPC to prepare and file a formal complaint "[i]n the event the screening panel finds probable cause to believe that there are grounds for public discipline and that a formal complaint is merited." This directive, however, is subordinate to rule 11 of the Utah Rules of Civil Procedure. See RLDD 17(a) ("Except as otherwise provided in these rules, the Utah Rules of Civil Procedure ... apply in formal discipline actions...."). Thus, the OPC is ultimately prohibited from presenting any pleading or paper to the court with knowledge, information, or a belief that such paper is being presented for an improper purpose, that the claims and other legal contentions are not warranted by existing law, or that the allegations and other factual contentions do not have evidentiary support. See Utah R. Civ. P. 11(b).

And one must ask, if the OPC lawyers are intended to act as prosecutors, are there not ethical standards that should also govern, which standards may well be in conflict with the OPC role as secretary to the Panel. Certainly in Panel hearings, even the configuration around the table tells a story. The Panel sits on one side. The complainant, respondent, and any counsel for those parties sit across the table from the Panel. The OPC lawyer sits at one end, not in any setting that suggests the adversarial system at work, but more like counsel to a board, sitting at the Panel's elbow, to advise. I am not suggesting any of this is intended or nefarious. I am suggesting when all of the factors are considered, more thought needs to be given to appropriate roles and perceptions.

4. **The Supreme Court's recent acceptance of substandard adjudication risks fostering an ever-declining professional performance in the discipline system.**

The heading to this section is provocative. I apologize for any offense, but consider the evidence, and the handcuffs that have been placed on OPC lawyers as they try to do their work professionally.

The Long case is an exhibit. I have read every decision since the present informal discipline was instituted. While Long is a convenient reference tool, it is consistent with all recent cases addressing informal discipline. In that decision, the court described the Panel's findings, conclusions, and recommendations using the following terms:

- somewhat conclusory (¶30)
- the most conclusory of the panel's findings of fact (¶31)
- Although the findings of fact could have been more particular, the lack of detailed findings (¶32)

Then the court concluded that the standards were nevertheless satisfied. I used this language in an exception hearing. I compared the Long findings with the findings, etc. in the matter I was arguing. It was certainly arguable whether the findings and conclusions in my case were more or less detailed and informative than those in Long, but the OPC response should be troubling to this Committee and the court. Paraphrased, it was that certainly the findings and conclusions could have been better, but the Long standard is the bar the court has set. That appears to be true. The question is, should it be the standard, at least when public reprimand is ordered.

Attachment 2

# THE UTAH JUDICIAL PROCEEEDINGS PRIVILEGE: THE CASE FOR EXTENSION OF THE PRIVILEGE TO PROFESSIONAL DISCIPLINE PROCEEDINGS

**Submitted by Robert K. Hilder**

**November 18, 2012**

## The Judicial Proceedings Privilege

On July 6, 2012, the Utah Supreme Court adopted a newly expansive view of the judicial proceedings privilege. Moss v. Parr Waddoups, 2012 UT 42. The privilege specifically provides an absolute immunity against civil suits. The decision does not expressly encompass professional conduct proceedings or in any way alter the Bar's ability to discipline or sanction lawyers who have engaged in misconduct. In fact, the decision expressly relies on rules of civil procedure, rules of professional conduct, and the court's inherent authority, to "provide adequate safeguards to protect against abusive and frivolous litigation tactics." Moss v. Parr Waddoups, at ¶ 38 (emphasis supplied) (*quoting* Clark v. Druckman, 624 S.E.2d 864, 870 (W.Va. 2005); *accord* Levin Middlebrooks v. U.S. Fire Ins. Co., 639 So.2d 606, 608 (Fla. 1994). It is my submission that the Advisory Committee should consider asking the Supreme Court to look at the judicial proceedings privilege again, this time in the context of bar disciplinary proceedings, and direct that for conduct that indeed fits within the privilege, professional discipline is not warranted.

The Utah court's brief reference to the foregoing precedent makes the case that while the judicial proceedings privilege provides an "extraordinary scope" of immunity, the exceptions for certain classes of [generally egregious] conduct, and the mechanisms that otherwise exist to govern conduct related to judicial proceedings, are sufficient to justify an otherwise absolute privilege. The heart of the analysis, and the reason this Committee should recommend that the Supreme Court eliminate the professional discipline loophole in the privilege, in the absence of "abusive and frivolous litigation tactics," is found in the discussion of the history and policies that support the privilege.[1]

## History

The doctrine has been in existence for centuries. *See, e.g.* Cutler v. Dixon, 76 Eng. Rep. 886, 887-88 (K.B. 1585), where the King's Bench rejected an action for words spoken in "course of justice," because such an action would hinder litigation for "those who have just cause for complaint." (*cited in* Loigman v. Twp. Comm. of Middletown, 889 A.2d 426 (N.J. 2006)). Utah's extension of the absolute privilege is brand new: "Whether the privilege extends to conduct as well as statements occurring in the course of judicial proceedings is an issue of first impression in Utah." Moss v. Parr Waddoups, at ¶ 29 (emphasis in original). The once common

[1] In other sections of its decision, the court identifies independent torts such as fraud, bad faith conduct generally, and some forms of abuse of process that forfeit the immunity provided by the privilege. Moss v. Parr Waddoups, at ¶ 37. Such conduct, which forfeits any right to invoke the privilege, obviously is not contemplated by my suggestion regarding extension of the privilege to professional conduct proceedings.

limitation of the privilege to words typically arose in the context of defamation. The privilege historically immunized all participants in a proceeding, including judge, counsel, parties and witnesses. The extension now embraced by the Utah Supreme Court seems mostly, if not entirely, crafted to protect lawyers, and the interests of their clients, in any conduct that "relates to" the proceedings. Id. at ¶ 28.[2]

Policy

To understand why this Committee should recommend, and the Supreme Court direct, extension of the privilege to professional conduct proceedings that might sanction conduct that is otherwise immune, we need to recognize what is at the heart of the Utah court's rationale in Moss v. Parr Waddoups, which is the policies that uphold the privilege. I reference statements of the Utah Supreme Court, and of courts upon which the Utah court relied:

- "The privilege is intended to promote the integrity of the adjudicatory proceeding and its truth finding processes." Moss v. Parr Waddoups, at ¶ 30 (citation omitted).

- "The Restatement (Second) of Torts recognizes that the privilege 'is based upon a public policy of securing to attorneys as officers of the court the utmost freedom in their efforts to secure justice for their clients.' Restatement (Second) of Torts § 586 cmt a (1977).

- "If an attorney could be held liable to an opposing party for statements made or actions taken in the course of representing his client, he would be forced constantly to balance his own potential exposure against his client's best interests." Moss v. Parr Waddoups, at ¶ 33 (citation omitted).

- "Lawyers . . . must be free to pursue the best course charted for their clients without the distraction of a vindictive lawsuit looming on the horizon." Id. at ¶ 36 (citation omitted).

- To hold that the privilege does not apply to conduct, "would invite attorneys to divide their interest between advocating for their client and protecting themselves from a retributive suit." Id. (citation omitted).

**Why the Judicial Proceedings Privilege Should Be Extended to Professional Conduct Proceedings That Involve Conduct Absolutely Immune From Civil Suit.**

The Committee, and ultimately the Utah Supreme Court, must reconcile Moss v. Parr Waddoups Brown Gee & Loveless, 2012 UT 42, with discipline rules, because the immunity the privilege extends was developed to provide the committed advocate protection, provided she is

[2] While the privilege once covered only in-court proceedings that is no longer the case. The Utah Supreme Court, and other courts on which it relies, use a variety of comprehensively inclusive terms to show the expansion of the privilege. Examples include: "in connection with representing a client in litigation," at ¶ 33; the privilege "must be accorded to any act occurring during the course of a judicial proceeding . . . so long as the act has some relation to the proceeding," at ¶ 32 (emphasis supplied); and "when an attorney is acting in his representative capacity pursuant to litigation, and not solely for his own interests." Taylor v. McNichols, 243 P.3d 642, 658 (Idaho 2010).

acting in the course of a judicial proceeding, and she does not step over the line that defines the privilege's boundaries. The protection provided is meaningless unless it extends beyond the traditional area of civil suits. As Utah's sister jurisdiction, Idaho, cited approvingly, "if the policy [the absolute privilege] is really to mean anything then we must not permit its circumvention by affording an almost equally unrestricted action under another label." Taylor v. McNichols, 243 P.3d 642, 653 (Idaho 2010) (quoting, Rainier's Dairies v. Raritan Valley Farms, 117 A.2d 889, 895 (N.J. 1955)).

The Rainier's court was expanding the privilege beyond defamation cases, not beyond civil suits, but the point remains valid: An absolute immunity that centers explicitly on letting the lawyer do her job without fear of retribution is meaningless if it does not protect against all retribution. The necessary check on misconduct must be grounded on an analysis of the nature and degree of misconduct, and the intent of the actor.

As counsel for lawyers facing discipline over the past year, I have been accused of suggesting that the privilege shields lawyers from all disciplinary proceedings. That is not so. I make no argument that the privilege serves to shut down the disciplinary process entirely—not even substantially. If conduct is abusive or frivolous—or subject to any other clearly stated exception to the privilege—such conduct belongs in the discipline process. All I argue is that the disciplinary rules should not to be used as a back door that eviscerates the privilege, unless that is what the Supreme Court intends.

The facts of Moss v. Parr Waddoups, provide the perfect illustration. Lawyers of distinction, including now Judge Waddoups, and Jonathan Hafen, were sued for allegedly improper actions, including the search of a private home, and seizure of property, in connection with an intellectual property case. There was no search warrant. When the lawyers and deputy sheriff first arrived at the home and sought to enter and seize property, the named defendant was away, and his girlfriend initially resisted the entry. After the officer suggested he could kick the door in, the lawyer wisely sought additional court authority while the officer stayed in place. Whether the authority received was legally sufficient was never decided. The Utah Supreme Court ruled that neither the lawyers nor their firm should be subject to suit under these facts.

The question that should be pondered is whether the Court even considered that the same lawyers could or should now face disciplinary action for their conduct in connection with the intellectual property lawsuit. I submit that was never the intention, but the door is wide open for such action. I have recently had the experiencing of defending two discipline cases where my client's actions in each matter paled against the alleged actions in Moss, but the privilege gave my clients no protection. I submit that the protection for zealous and selfless lawyers intended by the Court is of little benefit if they may still face Bar discipline. The Court's decision in Moss effectively makes that point: "[A]ttorneys must 'be free to use their best judgment in prosecuting or defending a lawsuit without fear of having to defend their actions in a subsequent civil action for misconduct.'" Moss, at ¶32 (citation omitted; emphasis added).

A professional conduct action is all about misconduct, and it is potentially a much greater source of fear for a lawyer than is a civil lawsuit. Having represented lawyers in four Utah OPC matters, and one federal matter in the last year, and having counseled another three lawyers with

pending maters, I do not exaggerate when I say that, given the choice between facing a civil suit as opposed to an OPC action, I would pay the plaintiff's civil filing fee to avoid the OPC action.

**The Exceptions to the Privilege Adequately Protect Against Egregious Misconduct Not Reasonably Related to Representation.**

The boundaries of the privilege are now well-surveyed and staked. Abusive or frivolous litigation tactics negate the privilege. Criminal conduct negates the privilege. Fraud or other bad faith conduct negates the privilege. Malicious prosecution negates the privilege, but only if it occurs outside the scope of the proceeding, or if undertaken for the lawyer's own interest. *See*, Moss at ¶¶ 37 & 38.

"[T]he privilege presumptively attaches to conduct and communications made by attorneys on behalf of their clients in the course of judicial proceedings." Moss, at ¶ 36. The question is whether any exception to the privilege applies to overcome the presumption. If the privilege does apply, its scope is absolute. *See, e.g.*, Taylor v. McNichols, 243 P.3d 642, 654 n. 5, & 655 (Idaho 2010). There is a clear boundary. If an exception defeats the application of the privilege, the alternative path is clear, and civil suits may proceed.

In one of my OPC cases the OPC cited Rules 1.1 and 1.2 to demonstrate that the Rules are not foreclosed by the judicial proceedings privilege even when conduct is neither abusive nor frivolous. The OPC is correct, and their argument demonstrates that extending the privilege consistently with the Moss reasoning does no harm to other conduct rules. Rules 1.1 and 1.2, and many others, are not pre-empted, because they address the lawyer's obligations to her client, or they address conduct not related to the lawyer's conduct in relation to a judicial proceeding. The judicial proceedings privilege addresses liability to a third-party, when the lawyer is acting for her client.

The privilege expressly recognizes a lawyer's duty to put her client's interests above her own. If she does that, without resorting to abusive or frivolous tactics, bad faith, criminal conduct, or other defined improper conduct, her fealty to the client will not be punished in a civil suit. I ask why this appropriate and necessary protection should not be extended to lawyer professional conduct proceedings.

Attachment 3

A. MITIGATING AND AGGRAVATING FACTORS SHOULD BE CONSIDERED IN ALL LAWYER DISCIPLINE PROCEEDINGS.

B. THE COMMITTEE SHOULD RECOMMEND RULES THAT REQUIRE A SIMPLIED FORM OF BIFURCATION IN THE INFORMAL PROCESS, OR THAT AT A MINIMUM PANELS SHOULD BE PROVIDED RULES AND METHODS TO AVOID INFECTING THE DISCIPLINE PROCESS WITH IMPROPER OVERLAP BETWEEN DETERMINATION OF MISCONDUCT AND DETERMINATION OF SANCTIONS.

**Submitted by Robert K. Hilder**

**November 18, 2012**

## A. Mitigation and Aggravation

Rule 14-604 states that "the following factors should be considered in imposing a sanction, after a finding of misconduct." (Emphasis added).

The factors include "the existence of aggravating and mitigating factors."

The instruction seems clear, "should," a form of "shall," is a mandatory term, and the instruction is consistent with principles of fairness and comprehensive adjudication of an appropriate penalty.

The clarity dims; however, in the opening words of Rule 14-607: "After misconduct has been established, aggravating and mitigating factors may be considered and weighed in determining what sanctions to impose." (Emphasis added).

The Chair of the Supreme Court's Committee on Ethics and Discipline recently ruled that the permissive "may" controls, because the rules of construction apply, and Rule 14-604 is general, while Rule 14-607 is specific. It is specific, but primarily as to the types of conduct that can be considered.

I do not criticize the reasoning. I argue that the ruling makes the need for clarity obvious. I also note that in the recent matter of Discipline of Nathan Jardine, the court used "should" language and a reference to Rule 14-604 when discussing mitigation. 2012 UT 67, ¶79. In the following paragraph, addressing aggravation, the court referred to Rule 14-607, but the context was not should vs. may, it was the detailed factors to be considered.

A discipline proceeding may be conducted without reference to mitigating or aggravating circumstances, but I suggest that to make the consideration entirely discretionary robs the process of some of its legitimacy. I submit that the system is not trusted by many lawyers, and every effort should be made to promote fairness in form and substance.

## B. Bifurcation: Misconduct, Harm, and Sanction

The formal disciplinary process in district court must be conducted through a bifurcated proceeding. The reason is clear— evidence of prior misconduct, and to some degree evidence of the degree of harm, can taint the adjudicatory integrity of the best-intentioned adjudicator. An experienced judge can compartmentalize effectively, but even she not always. In my Panel experience to date, I have felt that some—certainly not all—panel members get hung up at the outset because they have read or heard very emotional and dark versions of the harm done by the alleged misconduct. The problem is allied to the issue I raise regarding perceptions of the OPC's role as prosecutor, which I address in Attachment 1.

The bifurcation issue exists because there is no discretion exercised by the OPC, and no filtering of evidence that in any other forum would be excluded in the fault ("guilt") phase, because of unfair prejudice, confusion or introduction of bias. My concern is not academic. In a recent proceeding I handled, the Notice of Informal Complaint that was presented to the Panel included, in its earliest paragraphs, highly prejudicial allegations of great harm to a child, which indisputably occurred, if at all, one week before the lawyer's single act of alleged misconduct. In other words, the misconduct, even if it occurred (the NOIC was dismissed following the hearing), could not have had any causal relationship to the alleged harm. Nevertheless, that paragraph stating serious, but irrelevant harm, was one of the first items of substance in the NOIC.

One reason I address mitigation, aggravation, and bifurcation in one section is another real life experience. The Supreme Court makes it clear that criminal analogies are not helpful in arguing due process in discipline proceedings, because they are, in fact, civil. Even in the civil context; however, we are cautioned to avoid conflating concepts, and an apt analogy is found in the Court's fairly frequent recent discussions of the frivolous and bad faith attorney's fee provision formerly found in U.C.A. §78-27-56, and now in §78B-5-805. To award fees, the court must find the action or defense is frivolous or without merit, AND not asserted in good faith. Time and again parties and counsel press the fee claim while utterly failing to establish the absence of the good faith element. The Court has rejected these attempts consistently. See, e,g, Still Standing Stable LLC v. Allen, 122 P.3d 536, 2005 UT 46.

In my one Exception experience, I argued that mitigating factors should have been considered. I was rightly chastised for not recognizing that not all mitigating factors were presented to the Screening Panel, but it was the OPC response to my argument that brought this issue into focus. I was, of course, arguing mitigation in support of a lesser sanction. The OPC argued that mitigation must have been considered, because "it was likely the mitigating circumstances . . . that led the panel to conclude that [lawyer] only acted negligently in violating the rules of professional conduct." Using evidence intended solely to determine the sanction as a basis for a finding of mental state in the determination of liability is conflation defined, but in light of the approach taken by the OPC in not exercising more discretion in what they present,[1] it is almost understandable that the OPC would defend this confusion of process.

[1] The OPC may indeed understand their role correctly, but if so, that is an argument to either change and clarify the role, or to bifurcate proceedings in some way to guard against the harm that does and will result.

The final element that I address under the bifurcation label may be seen in another light, through the lens of causation analysis. The sanction decision "should" consider the potential or actual injury caused by the lawyer's misconduct. Rule 14-604(c). The causation requirement clearly exists, but I submit that because the OPC feels it must put before the Panel everything the complainant or a witness alleges, and leave it to the Panel to decide what it believes—with essentially no advocacy from the designated "prosecutor," causation is likely not consciously considered until well after the Panel has been infected by dispassionate statements of major or minor harm, without benefit of screening for credibility or relevance. One remedy is to separate the harm and causation evidence and adjudication from the conduct evidence.

**Attachment 4**

# RULES 4.1 THROUGH 4.4, RULES OF PROFESSIONAL CONDUCT

**Submitted by Robert K. Hilder**

**November 18, 2012**

The rules in Section 4 of the Rules of Professional Conduct seem to me to be tailored to address, as stated, "Transactions with persons other than clients." The four sub-sections each seem to address different classes of persons or entities. If that is the intent, there is a problem in the interpretation of the rules:

Rule 4.1 is straightforward, and I have no experience with misunderstanding of that Rule. Rule 4.2 defines the class clearly: persons (opposing or potentially opposing parties), represented by counsel). Rule 4.3 describes how lawyers must deal with unrepresented persons. It is the last Rule, 4.4, that creates a problem in its application. The title is "Respect for Rights of Third Persons." The rules already talk about represented and unrepresented persons. The content of the rule seems to support that it is concerned with rights of persons not a party to an action or transaction, but who can be drawn in to a conflict through discovery or other processes. Does Rule 4.4 purport to govern lawyer interaction with parties, represented or not? If not, it would be helpful to clarify what is intended. If, as I submit, Rule 4.4 describes a separate class of persons, not parties, with whom lawyers interact, or who they may affect as the lawyer pursues information to aid his client, then it should be clear that for parties to an action or transaction, Rules 4.1, 4.2 and 4.3 apply, but not Rule 4.4.

A third-person is "another person, etc. besides the two principal ones involved." Oxford Am. Dictionary. There are sound policy reasons why a different concern is identified for a third-person, or non-party. An opposing party has engaged in the dispute, either by initiating the suit, or through the exercise of the court's jurisdiction, with all due process protections. He is represented or not, but he is explicitly protected by Rule 4.2 or 4.3. The non-party, third-person, lacks the protection of Rule 4.3, or the shield of the skilled advocate. The first sentence of Comment (1) gives further insight (Duty to subordinate the rights of others—but competing duties must be balanced. "Third person" is specified, because we cannot be assured they can protect themselves without a lawyer or the shield of Rule 4.3).

Whatever was intended, I merely submit that it is not presently clear, and it is subject to being applied unevenly.

**Rule 1.10. Imputation of Conflicts of Interest: General Rule.**

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:

(1) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom, and

(2) written notice is promptly given to any affected former client.

(d) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.

(e) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

(f) A group of lawyers who serve as counsel to a governmental entity, such as the offices of the Utah Attorney General, the United States Attorney, a district, county or city attorney does not constitute a "firm" for purposes of Rule 1.10 conflict imputation.

**Comment**

*Definition of "Firm"*

[1] ~~[For purposes of the Rules of Professional Conduct, the term "firm" denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0(c).]~~"Firm," as used in this rule, is defined in Rule 1.0(d). Whether two or more lawyers constitute a firm ~~[within this definition]~~for purposes of determining conflict imputation can depend on the specific facts. See Rule 1.0, Comments [2] - [4].

[1a] Rule 1.10(f) does not appear in the ABA Model Rules. It is intended to recognize the inherent differences between an office of governmental lawyers and those in a firm, as defined in Rule 1.0(d). Notwithstanding the exclusion of an office of government lawyers from the provisions of Rule 1.10, all other conflicts rules, such as Rules 1.7, 1.8 and 1.11, must be fully satisfied on an individual-lawyer basis,

and the group of governmental attorneys must, by adopting appropriate procedures, ensure that attorneys for whom there are individual conflict issues do not participate in and are screened from the particular representation. See Rule 1.0(*l*) for definition of "screened."

**[No changes to comments 2-8.]**

**Billy Walker's proposal – 03/20/2013**

**Rule 8.3. Reporting ~~Professional~~ Misconduct.**

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable Rules of Judicial Conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.

Comment

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer relationship.

[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to

the reporting requirements of paragraphs (a) and (b) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public.

**Rule 8.4. Misconduct.**

It is professional misconduct for a lawyer to:

(a) ~~violate or~~ attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to violate or attempt to do so, or do so through the acts of another~~;~~.

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(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Comment

[1] Lawyers are subject to discipline when they ~~violate or~~ attempt to violate the Rules of Professional Conduct, or knowingly assist or induce another to violate or attempt to do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

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[1][a] Utah Rule differs from the model rule because in Utah it is not a violation of 8.4(a) if the only misconduct is a violation of another rule of professional conduct. See 14-509 of the Supreme Court Rules of Professional Practice for the definition of lawyer misconduct.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty,

breach of trust or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

[4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

**Rule 14-509. ~~Grounds~~Misconduct and grounds for discipline.**

It shall be misconduct and a ground for discipline for a lawyer to:

(a) violate the Rules of Professional Conduct;

(b) willfully violate a valid order of a court or a screening panel imposing discipline;

(c) be publicly disciplined in another jurisdiction;

(d) fail to comply with the requirements of Rule 14-526(e); or

(e) fail to notify the OPC of public discipline in another jurisdiction in accordance with Rule 14-522(a).

**Rule 14-605. Imposition of sanctions.**

Absent aggravating or mitigating circumstances, upon application of the factors set out in Rule 14-604, the following sanctions are generally appropriate.

(a) Disbarment. Disbarment is generally appropriate when a lawyer:

(a)(1) knowingly engages in ~~professional~~ misconduct as ~~defined~~described in Rule ~~8.4(a), (d), (e), or (f)~~14-509 of the Supreme Court Rules of Professional ~~Conduct~~Practice with the intent to benefit the lawyer or another or to deceive the court, and causes serious or potentially serious injury to a party, the public, or the legal system, or causes serious or potentially serious interference with a legal proceeding; or

(a)(2) engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution, or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or

(a)(3) engages in any other intentional misconduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice law.

(b) Suspension. Suspension is generally appropriate when a lawyer:

(b)(1) knowingly engages in ~~professional~~ misconduct as ~~defined~~described in Rule ~~8.4(a), (d), (e), or (f)~~14-509 of the Supreme Court Rules of Professional ~~Conduct~~Practice and causes injury or potential injury to a party, the public, or the legal system, or causes interference or potential interference with a legal proceeding; or

(b)(2) engages in criminal conduct that does not contain the elements listed in Rule 14-605(a)(2) but nevertheless seriously adversely reflects on the lawyer's fitness to practice law.

(c) Reprimand. Reprimand is generally appropriate when a lawyer:

(c)(1) negligently engages in ~~professional~~ misconduct as ~~defined~~described in Rule ~~8.4(a), (d), (e), or (f)~~14-509 of the Supreme Court Rules of Professional ~~Conduct~~Practice and causes injury to a party, the public, or the legal system, or causes interference with a legal proceeding; or

(c)(2) engages in any other misconduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law.

(d) Admonition. Admonition is generally appropriate when a lawyer:

(d)(1) negligently engages in ~~professional~~ misconduct as ~~defined~~described in Rule ~~8.4(a), (d), (e), or (f)~~14-509 of the Supreme Court Rules of Professional ~~Conduct~~Practice and causes little or no injury to a party, the public, or the legal system or interference with a legal proceeding, but exposes a party, the public, or the legal system to potential injury or causes potential interference with a legal proceeding; or

(d)(2) engages in any ~~professional~~ misconduct not otherwise identified in this rule that adversely reflects on the lawyer's fitness to practice law.

**Gary Sackett 032013.....Rule 14-605. Imposition of sanctions.**

(a) Absent aggravating or mitigating circumstances, upon application of the factors set out in Rule 14-604, the following sanctions are generally appropriate.

([a]1) **Disbarment.** Disbarment is generally appropriate when a lawyer:

([1]i) knowingly engages in professional misconduct as defined in Rule 8.4(a), (d), (e), or (f) of the Rules of Professional Conduct with the intent to benefit the lawyer or another or to deceive the court, and causes serious or potentially serious injury to a party, the public, or the legal system, or causes serious or potentially serious interference with a legal proceeding; or

([2]ii) engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution, or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or

([3]iii) engages in any other intentional misconduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice law.

([b]2) **Suspension.** Suspension is generally appropriate when a lawyer:

([1]i) knowingly engages in professional misconduct as defined in Rule 8.4(a), (d), (e), or (f) of the Rules of Professional Conduct and causes injury or potential injury to a party, the public, or the legal system, or causes interference or potential interference with a legal proceeding; or

([2]ii) engages in criminal conduct that does not contain the elements listed in Rule 14-605(a)(2[b][i]) but nevertheless seriously adversely reflects on the lawyer's fitness to practice law.

([c]3) **Reprimand.** Reprimand is generally appropriate when a lawyer:

([1]i) negligently engages in professional misconduct as defined in Rule 8.4(a), (d), (e), or (f) of the Rules of Professional Conduct and causes injury to a party, the public, or the legal system, or causes interference with a legal proceeding; or

([2]ii) engages in any other misconduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law.

([d]4) **Admonition.** Admonition is generally appropriate when a lawyer:

([1]i) negligently engages in professional misconduct as defined in Rule 8.4(a), (d), (e), or (f) of the Rules of Professional Conduct and causes little or no injury to a party, the public, or the legal system or interference with a legal proceeding, but exposes a party, the public, or the legal system to potential injury or causes potential interference with a legal proceeding; or

([2]ii) engages in any professional misconduct not otherwise identified in this rule that adversely reflects on the lawyer's fitness to practice law.

(b) For purposes of this rule, sanctions may be based on a violation of Rule 8.4(a) only in connection with (i) a violation of, (ii) an attempt to violate, (iii) knowingly assisting or inducing another to violate or (iv) violating through the acts of another one or more of the other Rules of Professional Conduct. A violation of Rule 8.4(a) without reference to another Rule of Professional Conduct does not provide a separate basis for imposing or increasing sanctions.